84-390

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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

LEON S. WOLK.

Petitioner,

vs

SUPREME COURT OF NEW JERSEY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF NEW JERSEY

Leon S. Wolk
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32 pp

## QUESTIONS PRESENTED FOR REVIEW

### I

Where the Supreme Court of New Jersey, by denial of motion for reinstatement on May 8, 1984, has thereby reaffirmed its decision of disbarment dated April 3, 1980, In re Wolk, 82 N.J. 326 (1980), and where petitioner appearing pro se and while incompetent ignores a show cause order for reciprocal disbarment issued by the United States District Court For The District Of New Jersey, Misc. 80-25, wherein petitioner had been derivatively admitted to practice as an attorney, and as a result was disbarred, but petitioner appearing pro se and while incompetent did respond to show cause order for reciprocal disbarment issued by this Court, No. D-187, but was reciprocally disbarred on December 1, 1980, but said show cause order, was stayed, based upon petitioner's response thereto, by the United States District Court For The District Of Columbia, Attorney Grievance Docket No. 80-2, wherein petitioner separately had been admitted by examination, which disciplinary proceeding is

still pending, and where petitioner after intensive psychotherapy is now competent, the United States Supreme Court by reason of Constitutional defects in State disbarment proceeding and in the excercise of its jurisdiction over the federal bar and the United Supreme Court bar, should not this Court in the alternative order the following;

(I) grant the petition for a writ of certiorari to the Supreme Court of New Jersey but defer briefing until final determination of the United States District Court For The District Of Columbia, or

(II) defer the decision on the within petition until the final decision of the United States District Court For The District Of Columbia, and

(III) grant petitioner leave to expand and or file supplement to within petition and appendix to include pending proceeding in District of Columbia?

II

Whether a Constitutionally defective disbar-

ment of an attorney by the highest court of the State of New Jersey, is lawful.

III

Whether disbarment by the Supreme Court of New Jersey which is repugnant to the Constitution of the United States should be allowed to provide the basis for reciprocal disbarment by the United States Supreme Court and the federal bar.

IV

Where an attorney in a quasi criminal disciplinary proceedings is allowed while mentally incompetent to appear pro se before the New Jersey Disciplinary Review Board and the Supreme Court of New Jersey is there a denial of right to counsel, due process and fundamental fairness under the United States Constitution U.S.C. Const. Amend 5th,6th and 14th.

V

Whether the application in 1980, of retroactively, a new more severe discipline of disbarment of an attorney for unethical misconduct committed during a period from 1973 through

1977 is repugnant to the Constitutional right of equal protection of the laws and prohibition against ex post facto laws, U.S.C. Const. Art.1 sec.9,cl.3, Art1 sec.10,cl.1., Amend. 5th, 6th and 14th.

VI

Whether petitioner's mental incompetency when reciprocally disbarred by this Court and the federal bar, United States District Court For the District Of New Jersey, which mental incompetence existed at the time of the acts of misconduct and continued through the time of the disciplinary proceedings, and after intensive pshychotherapy regained competency was and is a matter of mitigation not previously considered by this Court, although relevant on the issue of appropriate discipline to be imposed as well as a meritorious defense, was the failure so to do by the Supreme Court of New Jersey a denial of fundamental fairness, due process, equal protection of the law, right to counsel under the Constitution of the United States and considering all of the facts and circumstances includ-

ing disbarment since April 3, 1980, intensive psychotherapy and regained competency, should not petitioner be reinstated to the bar of this Court and the federal bar?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

LEON S. WOLK, Petitioner

vs.

SUPREME COURT OF NEW JERSEY,

Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

---

The petitioner, Leon S. Wolk, appearing pro se respectfully prays that a writ of certiorari issue to review the order of disbarment and opinion of the Supreme Court of New Jersey dated April 3, 1980 and its order denying motion for reinstatement dated May 8, 1984.

## OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (Appendix, A-1) is reported at 82 N.J. 326. The order of disbarment (Appendix, C-1) is dated April 3, 1980. The order denying

motion for reinstatement is dated May 8, 1984 (Appendix D-1), and is unreported.

## GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The order of disbarment was entered by the Supreme Court of New Jersey, the highest court of the State, on April 3, 1980 and is reported at 82 N.J. 326. (A-1,C-1). The order denying motion for reinstatement is dated May 8, 1984 (D-1). The petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec.1257 (3). The Orders of the Supreme Court of New Jersey are Constitutionally repugnant.

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## STATEMENT OF THE CASE

Petitioner was admitted by examination to the bar of the United States District Court For The District of Columbia and based upon said license became a commissioned officer of the United States Air Force, Judge Advocate General's Department and served on active duty for three years. Upon honorable discharge, petitioner by examination was admitted to the bar of the State of New Jersey and was thereafter derivatively admitted to the bar of the United States Supreme Court and to the bar of the United States District Court For The District of New Jersey.

Petitioner was charged with unethical acts of misconduct ("Stern Complaint") and thereafter and while the disposition of that complaint was still pending petitioner was charged with unethical act of misconduct ("Hamburger Complaint"). Petitioner appeared with counsel on the first ethics complaint but appeared pro se on the second ethics complaint, the New Jersey Supreme Court Disciplinary Board of Review

("Board") and the New Jersey Supreme Court.. Petitioner was incompetent beginning in 1972 and continuing beyond April 3, 1980.

Both ethics cases were consolidated for disposition before the "Board" where the petitioner appeared pro se and raised the issue of his incompetence by demeanor, argument and brief (H-1,I-1-I-3). Petitioner contended that he was suffering from deep depression, however the "Board" allowed the cases to continue with petitioner appearing pro se and unanimously recommended disbarment. (H-1 - H-11, compare H-3 - H-4). The "Board" concluded that petitioner's contention of incompetence was incredible,

> "...the Board pays little moment to respondent's contention, raised for the first time at the hearing before the Board, that he was suffering from severe depression ..." B-2)

Petitioner appeared pro se before the Supreme Court of New Jersey where again he raised the issue of his incompetence, in his demeanor, brief and argument (I-1). He

described his condition as severe depression which had existed during the time of the acts of misconduct and continued during the time of argument before the highest court of the State (I-1). Both a forensic psychiatrist and a treating psychiatrist would conclude petitioner was incompetent (M-5, M-19). The highest court of the State disbarred petitioner on April 8, 1980 (C-1). Petitioner received psychotherapy and upon being again competent, appearing pro se filed a motion for reinstatement (K-1) to the Supreme Court of New Jersey on April 27, 1984. Said motion was supported by a brief, raising Constitutional issues (L-1) and an appendix containing a medical expert report of a forensic psychiatrist, Dr. Lowell (M-19) and treating psychiatrist, Dr. Papowitz (M-5). These reports corroborate petitioner pro se contention that at all times relevant he had been and was suffering from severe depression which the psychiatrists concluded was mental incompetence (M-5, M-19). The brief filed with the Supreme Court of New Jersey raised below

all of the Constitutional issues contained in the within petition (L-1).

Petitioner appeared pro se before the "Board" (H-1) and the Supreme Court of New Jersey (J-1). Both the "Board" and the highest court of the State had the jurisdiction to order petitioner to submit to a psychiatric examination but both rejected the issue and he was disbarred for acts of misconduct including acts of intent to defraud, (X-1,A-1,C-1,B-1). The Supreme Court of New Jersey concluded

> "...Respondent's contention (of his) ...depression ... (is) ... grasping, selfserving and of no relevance to his offense..." 82 N.J. 330 (parenthetical inserts supplied)

Both the "Board" and the highest court of State disposed of the issue of petitioner's mental incompetence on a theory of waiver or relevance or credibility. When petitioner's pro se contention was corroborated by medical expert opinion in motion for reinstatement

(K-1, L-1, M-1), brief and appendix, filed on April 27, 1984 a summary decision of denial was rendered on May 8, 1984. (Compare K-1, L-1, M-1 and D-1). Thus in both the original hearings in 1979 and 1980 and again in 1984 the "Board" and the highest court in the State chose to ignore the issue of petitioner's mental incompetence or held to the effect that in the case sub judice a mentally incompetent petitioner appearing pro se can waive the issue and can waive his right to independent competent counsel.

It is Constitutionally repugnant to hold in effect that a mental incompetent petitioner appearing pro se was competent to waive his right to independent competent counsel and was competent to represent himself and that he was competent to waive the issue by not having introduced evidence of his own mental incompetence by expert testimonial evidence while appearing pro se. Clearly the record below supports the conclusion that the disbarment is Constitution-

ally repugnant.

Petitioner appearing pro se and while mentally incompetent responded to Order To Show Cause issued by this Court and the United States District Court For The District Of Columbia (E-1) but petitioner ignored an Order To Show Cause issued by the United States District Court For The District of New Jersey, all of which had as their objective the reciprocal disbarment based upon disbarment by the Supreme Court of New Jersey. Petitioner was disbarred reciprocally by this Court (G-1) and in the federal bar in New Jersey in 1980, Misc. No. 80-25. The United States District Court For The District of Columbia, however, granted a stay of reciprocal disbarment and proceeding is still pending (E-1, O-1, P-1, Q-1) Attorney Grievance Docket No. 80-2. It was necessary, however, to file the within petition within 90 days of May 8, 1984 and prior to receipt of a final decision on the issue of reciprocal disbarment pending in the District of Columbia under Rule 4-3(II. This

Court should vacate its disbarment Order under Rule 8. The issue of petitioner's mental incompetence was raised by his demeanor before Judge Stern and the Ethics Committees. Petitioner failed to respond to the Order To Show Cause for reciprocal disbarment issued by the United States District Court For the District of New Jersey and was disbarred in 1980, Misc. No. 80-25. Petitioner while mentally incompetent ignored this proceeding because he believed that he would be denied a fair and impartial hearing in a United District Court where one of the complainant's against him was Judge Herbert Stern presiding in that very court and the Chairman of the "Board" was Dickinson R. Debevoise, who shortly after rendering the decision and recommendation of disbarment decided on September 19, 1979 but dated October 4, 1979, was himself appointed a Judge of the same United States District Court For The District of New Jersey on November 2, 1979. Fearing what petitioner while mentally incompetent perceived to be the bias

and hostility and prejudice of both Judge Stern and Judge Debevoise he elected to ignore the proceeding for his reciprocal disbarment. This Court should review the forensic psychiatrist's report regarding petitioner's perception of reality in 1980. Compare the press release of Judge Stern dated December 22, 1976, while his ethics complaint was still pending (N-1) with Dr. Lowell's comments (M-19,20,42-47,53,58-59,69-70,73-75,79-88,89,90,M-95-103,104-113).

The Constitutional issues raised below are as follows:

-denial of due process wherein a mentally incompetent petitioner was allowed to appear pro se,

-denial of right to independent competent counsel in a quasi criminal proceeding that is an attorney disciplinary proceeding,

-denial of equal protection of the laws,

-violation of the prohibition against ex post facto laws, and

-denial of fundamental fairness.

The conclusion of treating medical psychiatrist, Eugene B. Papowitz, M.D. that respondent,

> "...was suffering from a severe and incapacitating psychiatric illness during the events which led to his disbarment. ...(and that) ... he was incompetent mentally to practice law or to conduct his own defense ... (and the) ... offenses he committed and for which he was disbarred were the result of mental illness ...".
> (Complete report annexed hereto, parenthetical insert supplied) Appendix, M-16).

Petitioner's contention of mental incompetence both at the time of the occurrence of the acts of misconduct and at the time of the hearings before the "Board" and the Supreme Court of New Jersey are further corroberated by the forensic medical psychiatric report of Edward H. Lowell, M.D. which conclusion in part states,

> "...(that respondent) at this time is suffering from a substantial mental disturbance of a complex nature ... that conclusion is unqualifiedly corroborated by the psychometric examinations performed which reveal paranoid schizophrenic fea-

tures with severe depressive overtone, a labile stability with potential decompensation, interference with mental processes and severe inroads in the area of judgement. ... (and that) this illness existed prior to, during, after and since the time of his condemned behavior, and most certainly during the time of the charges against him and his defense of those charges. ..."
(parenthetical inserts supplied)
(Appendix, M-24, M-25).

## ARGUMENT IN SUPPORT OF GRANTING OF THE WRIT

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The decision of disbarment by the highest court of the State of New Jersey is repugnant with the United States Constitution and in conflict with applicable decisions of this Court, reaffirmed by denial of motion.

The Supreme Court of New Jersey and its Disciplinary Review Board have held in effect that the issue of mental incompetence of petitioner appearing pro se in a quasi criminal attorney disciplinary proceeding, may be waived, lacks relevance, and that right to independent competent counsel may be waived while incompetent.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63,67

> "... if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Massey v. Moore, 348 U.S. 105 holding to the effect that an insane man tried without counsel cannot be held to the requirement of tendering the issue of his insanity at the trial

and the Constitutional right is not waived.

> "... No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court ..." p. 108

See also Wade v. Mayo, 334 U.S. 672,684

> "...Where such (mental incapacity)is present, the refusal to appoint counsel is a denial of due process under the Fourteenth Amendment. ..." (parenthetical insert supplied).

This Court has held that reciprocal disbarment is not automatic and a disciplinary proceeding is quasi criminal, affording a Constitutional right to due process. Theard v. United States, 354 U.S. 279, Faretta v. California, 422 U.S. 806, In re Ruffalo, 390 U.S. 544, In re Gault, 387 U.S. 1, Spevack v. Klein, 385 U.S. 511, Selling v. Radford, 243 U.S. 46. The requirement of due process must be met in a State disbarment proceeding. Willner v. Committee on Character, 373 U.S. 96, 102, Rule 8, In re Isserman, 345 U.S. 286 rev'd, 348 U.S.

1, compare United District Court For The District of Columbia Rule 4-3(II) (d). The disbarment by the Supreme Court of New Jersey ar' its reaffirmance in the denial of motion to reinstate are Constitutionally repugnant and should not afford the basis for reciprocal disbarment by this Court, Rule 8, nor from the federal bar. The within writ should be granted to reaffirm even a disbarred former attorney is entitled to the right to due process, independent counsel, fundamental fairness, equal protection of the laws and protection against ex post facto retroactive application of a more stringent discipline of disbarment of an attorney for unethical conduct committed during a period from 1973 through 1977 in 1980 than had ever previously been imposed for similar acts of misconduct. U.S.C. Const..Art. 1 sec.9 cl.3, Art 1 sec.10 cl.1, Amend. 5th, Amend 6th, Amend. 14th, Marks v. United States, 430 U.S. 188, Lanzetta v. New Jersey, 306 U.S. 451,453, Bowie v. City of Columbia, 378 U.S. 347, Rabe v. Washington, 405

U.S. 313. In re Smock 89 N.J. 426 where the Supreme Court of New Jersey recognized that it would be unfair to apply a more stringent discipline of disbarment retroactively to misconduct that had occurred prior to rendering of a more stringent rule. In the case sub judice the highest court of the State of New Jersey violated its own concept of fairness as well the standard imposed by the Constitution of The United States. Petitioner contends that a review of all of the disciplinary cases decided in New Jersey by its highest court for similar or even more serious acts of misconduct (assuming per arguendo but not conceeding that mental incompetence is not relevant on the issue of meritorious defense or in mitigation) fails to reveal the imposition of disbarment to other attorneys. Compare In re Wolk 82 N.J. 326, DR 1-102 (4-6), DR 5-104 (A), DR 5-105 (B),(C), DR 7-102 (A) (5) with disciplinary standards imposed at time of acts of misconduct from 1973 through 1977. Compare In re Sears, (1976) 71 N.J. 175,

suspension for three years where misconduct included attempt to influence S.E.C. investigation and giving false testimony, In re Shamy, (1977) 73 N.J. 187 one year suspension for execution of false affidavits, In re Hurd, (1976) 69 N.J. 316 three month suspension for arranging a loan whereby realty is conveyed from longtime unsophisticated friend and failure to seek independent counsel where conveyance is made to attorney's sister for 20% of its value, In re Caruso, (1975) 67 N.J. 44 suspension for three years for conviction for obtaining money under false pretenses and soliciting another to commit a crime, In re McNally, (1979) 81 N.J. 304 suspension for two years for forging a sheriff's name to a deed of foreclosure and fraudulently witnessing document, In re Schleimer, (1978) 78 N.J. 317 one year suspension for conviction for false swearing, In re Rosen, (1981) 87 N.J. 572 suspension for two years for lying to a grand jury.

In the case sub judice the Supreme Court of New Jersey disposed of petitioner's contention that he was suffering from severe depression by ignoring its own Rules of Procedure, R.1:20-2(f), R1:20-3(f) and R1:20-11(b), (c). Further the highest court of the State of New Jersey cited In re McManus (1978) 75 N.J. 238 for holding that the issue of mental incompetence "... is grasping, selfserving and of no relevance to his offense..." In re Wolk supra p. 330 in the McManus case supra in a footnote on page 241 the New Jersey Supreme Court expresses an attitude of scepticism towards the issue of mental disorder as a meritorious defense to a charge of ethical misconduct and holding that this issue is "...discretionary..." is contrary to the decisions of this Court holding to the effect Spevack v. Klein supra p. 518. In other cases the Supreme Court of New Jersey did recognize that mental incompetence was at least a mitigating circumstance but not in the case sub judice. Compare, In re Dreier (1983) 94 N.J. 396,399,

In re Infinito, (1983) 94 N.J. 50,57-58, In re Barry, (1982) 90 N.J. 286, In re Goldstaub (1982) 90 N.J. 1, 5, In re Barrett (1982) 88 N.J. 450,458-459. In re Greenberg (1956) 21 N.J. 213, In re M, (1971) 59 N.J. 304, In re Gelzer (1960) 31 N.J. 542, In re Rosenblatt, (1972) 60 N.J. 505, In re Ferraro, (1969) 53 N.J. 183, In re Boyle, (1966) 47 N.J. 58, In re Harris (1915) 88 N.J.L. 18.R.1:20-2(f), R.1:20-3(f), R.1:20-11(b), (c). In re Smock,89 N.J. 426.

In the case sub judice alone is the punishment of disbarment imposed retroactively where in similar acts of misconduct particularly where there was a mental or psychological issue it is considered as a matter in mitigation and a less severe discipline was imposed. A review of decisions in other similar disciplinary cases leads to the conclusion that disbarment of petitioner reaffirmed by summary denial of motion for reinstatement is Constitutionally repugnant and this Court should grant the within petition for a writ of certiorari and grant the motions

to allow even a disbarred former attorney who was mentally incompetent during acts of misconduct which continued during disciplinary proceedings, to be afforded rights, privileges and immunities as guaranteed under the Constitution of the United States, 28 U.S.C. Rule 8 and the jurisdiction of this Court over its Bar and the federal bar.

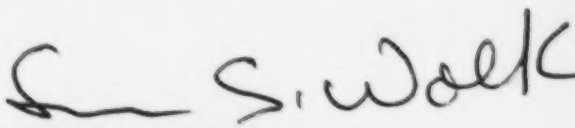
The Supreme Court of New Jersey and its "Board" and its Ethics Committees, ignored New Jersey Rules of Procedure,R.1-:20-2(f),R.1:20-3(f) R. 1:20-11(b) (c), New Jersey Statutes,N.J.S. 2C:4-1,2C:4-2,2C:4-4(a)2C:4-6,the New Jersey Constitution, N.J.S.Const. Art.1,par.1,Art.1, par.10,Art.4,sec. 7,par.3,Art.6,sec.2,par.3 and the United States Constitution, U.S.C. Const. Art. 1,sec. 9, cl.3,Art.1,sec.10,cl.1, Amend- 5th, 6th and 14th. Petitioner's disbarment by the Supreme Court of New Jersey is Constitutionally repugnant and should not be the basis for reciprocal disbarment by this Court, the federal courts and the Writ of Certiorari should be granted.

## CONCLUSION

By reason of all of the aforesaid the within petition for a writ of certiorari to the Supreme Court of New Jersey should issue to review its order of disbarment and its reaffirmance by denial of motion to reinstate.

Dated August 1984

Respectfully submitted,



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